Four Seasons Solar Products Corporation *and* Local 137, Amalgamated Workers Union of America, Petitioner. Case 29–RC–9061

September 15, 2000

DECISION ON REVIEW AND ORDER DISMISSING PETITION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 17, 1998, the Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election in the above-referenced proceeding in which he found that the Petitioner was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. He also found that the collective-bargaining agreement between the Employer and the Intervenor[1] did not constitute a bar to the instant representation petition on several grounds. Specifically, he found that the contract did not operate as a bar because it appeared to require employees to pay moneys other than dues and initiation fees as a condition of employment; its union-security provision failed to provide the requisite 30-day grace period for nonmember incumbent employees to join the Union as required under Section 8(a)(3) of the Act; it granted superseniority to the shop steward for all purposes, including layoff, rehire, bidding, and job preference; it appeared to award certain benefits to employees based upon their membership and position in the Union; and its concurrent 45-day probationary and grace periods for new employees appeared to go beyond the limited form of union security permitted by Section 8(a)(3) of the Act.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Intervenor and the Employer filed timely requests for review. By order dated September 3, 1998, the Board granted review of the Regional Director's Decision solely with respect to the bar quality of the existing contract as it raised substantial issues warranting review. The election was held as scheduled on August 7, 1998, and the ballots were impounded pending the Board's Decision on Review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this case, including the briefs,[2] we find, contrary to the Regional Director, that the contract operates to bar the representation petition herein.

The Employer is engaged in the manufacture and sale of sunrooms. The Employer and Intervenor have had a collective-bargaining relationship for 18 years. This relationship has been memorialized in a series of contracts. The latest of these contracts, by its terms, was made and entered into on August 12, 1995,[3] was effective from August 12, 1995, until August 11, 1998, but was not signed by the Intervenor and the Employer until October 17 and 25, 1995, respectively.[4] The instant petition, which sought a unit of all production, maintenance, shipping and receiving employees at the Employer's Holbrook, New York facility was filed on June 19, 1998, 53 days prior to the expiration of the contract.

1. At the hearing, the Employer and the Intervenor contended that inasmuch as the petition herein was filed during the 60-day insulated period preceding the contract's expiration date, their contract barred a representation election in the unit concerned here. See *Appalachian Shale Products Co.*, 121 NLRB 1160, 1164 (1958). The Petitioner took the position, however, that the contract did not operate as a bar because it unlawfully required the payment of assessments as a condition of employment.

The Regional Director, agreeing with the Petitioner's position, examined the various clauses of the union-security provision and determined that a reasonable employee reading them together would conclude that the contract required, as a condition of employment, the payment of assessments.[5] In reaching this conclusion,

[1] Highway and Local Motor Freight Drivers, Local Union No. 707, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.

[2] International Brotherhood of Teamsters, AFL–CIO, filed an amicus brief, which we have considered.

[3] The instant contract states in its preamble: "THIS AGREEMENT made and entered into this 12th day of August, 1995 by [Four Seasons Solar Products and Local 707, which hereby] agree to be bound by the terms and provisions of this Agreement for the period August 12, 1995 to August 11, 1998."

[4] The signatures of the Intervenor's president and secretary-treasurer appear on the final page of the contract and are dated October 17, 1995. The signature of Chris Esposito, the Employer's president, is dated October 25, 1995.

[5] The agreement contained the following pertinent clauses:

Article III: UNION SECURITY

Section 1: Union Shop

a) *Condition of Employment*: It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing and those who are not members on the effective date of this Agreement, shall on the thirtieth (30th) day following the effective date of this Agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall, on the forty-fifth (45th) day following the beginning of such employment, become and remain members in good standing in the Union.

b) *Failure to become a member*: An employee who has failed to acquire, or thereafter maintain, membership in the Union as herein provided, shall be terminated seventy-two (72) hours after his Employer has received written notice

the Regional Director found that while Sections 1(b) and 3 might leave an employee with the initial impression that the payment of dues and initiation fees would be sufficient to retain his or her employment, considerable ambiguity remained as to what actually constituted an employee's membership obligations under the contract. He then determined that this ambiguity could only be resolved by looking at the dues-checkoff clause, which provides that the Employer will deduct, in addition to dues and initiation fees, assessments, pursuant to written authorization "where laws require written authorization."[6] Accordingly, as the contract appeared to him to require the payment of assessments as a condition of employment, the Regional Director, relying upon *Santa Fe Trail Transportation Co.*, 139 NLRB 1513 (1962), ultimately concluded that the contract could not serve as a bar to the petition herein.

Contrary to the Regional Director, we find that the contract language regarding certain payments to the Union does not operate to remove the contract bar to the instant petition, since the contract contains no express requirement that an employee pay assessments as a condition of employment. In *Paragon Products Corp.*, 134 NLRB 662 (1961), the Board set out the three instances where a contract will not bar the processing of a petition because of an unlawful union-security provision:

> [W]e now hold that only those contracts containing a union-security provision which is clearly *unlawful on its face*, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.
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> Such unlawful provisions include (1) those which expressly and unambiguously require the employer to give preference to union members (a) in hiring, (b) in laying off, or (c) for purpose of seniority; (2) those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period; and (3) *those which expressly require as a condition of continued employment the payment of sums of money other than* "*periodic dues and initiation fees uniformly required.*"

Id. at 666 (emphasis added). See also *Gary Steel Supply Co.*, 144 NLRB 470 (1963) (applying *Paragon Products* rules to dues-checkoff provisions).

In *Santa Fe*, supra, 139 NLRB at 1514–1515, the Board found that the union-security provision involved was on its face unlawful and fell within the ban set forth in *Paragon Products* on clauses which expressly require as a condition of continued employment the payment of sums of money other than "periodic dues and initiation fees uniformly required." In the instant case, the dues-checkoff clause contains no statement that payment of

from an authorized representative of the Local Union certifying that membership has been, and is continuing to be offered to such employee on the same basis as all other members and, further, that the employee has had notice and opportunity to make dues or initiation fee payments.

Section 2: Hiring Additional Men and Probationary Period

The Employer shall notify the Union when new employees are to be hired. The Union shall have the right to send applicants for the job or jobs and the Employer agrees to interview such applicants and give the same interview considerations to Union sent applicants as is given to applicants from other sources. This provision shall not be deemed to require the Employer to hire Union applicants or to preclude the Employer from hiring employees from other sources. The Employer reserves the right to finally pass on the qualifications and experience of all applicants for employment. During the probationary period of forty-five (45) days the employee may be discharged without further recourse, provided, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After the probationary period, the employee shall be placed on the regular seniority list.

Section 3: New Employees–(Full Time)

The Employer shall immediately upon employment, notify the shop steward, or the Union if there is no shop steward, of the employment of any man, who under this Agreement is required to be a member of the Union. Upon notice from the Union that any employee, who, forty-six (46) days from the date of first employment has failed to tender periodic dues and initiation fees uniformly required as a condition of acquiring and retaining membership, the Employer agrees to terminate such employee after receipt of seventy-two (72) hours written notice, excluding Saturdays, Sundays and Holidays, from a properly authorized official of the Union, certifying that membership has been and is continuing to be offered to such employee on the same basis as all other members and further that the employee has had notice and opportunity to make all dues payments. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act but not retroactively.

Section 4: Check-Off

The Employer agrees to deduct from any regular employees covered by this Agreement, initiation fees, dues and uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws require written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law.

[6] Under Sec. 302 of the Act, it is unlawful for an employer to deduct membership dues from the wages of any employee unless the employee has authorized such deductions in writing. See 29 U.S.C. § 302(c)(4).

"uniform assessments" is a condition of employment or is even required. The union-security clauses that do contain "condition of employment" language mention only dues and initiation fees and require only that employees "be and remain members of the Union in good standing."[7] Under these circumstances, we conclude that the contract does not expressly require the payment of assessments as a condition of employment and thus does not fall within the ban set forth in *Paragon Products*. Accordingly, *Santa Fe* is inapplicable to the instant case.[8]

2. The Regional Director also found that the contract forfeited its bar quality because it was retroactively effective and thereby withheld from nonmember incumbent employees the 30-day grace period within which to join the Union as guaranteed by Section 8(a)(3) of the Act. The issue of the contract's retroactivity and the effect upon its bar quality status was raised sua sponte by the hearing officer at the hearing. Although the Petitioner took no position on the matter, the Intervenor, relying on *Federal-Mogul Corp.*, 176 NLRB 619 (1969), argued that the contract was not retroactively effective. In reaching his conclusion, the Regional Director found that while the Board had never explicitly overruled *Federal-Mogul*, neither had it ever reaffirmed its holding therein. Consequently, he concluded that the proper standard for evaluating the lawfulness of the union-security provision in this matter, and its impact upon the contract's bar status, was the standard set forth in *Standard Molding Corp.*, 137 NLRB 1515 (1962).[9] Applying *Standard Molding*, the Regional Director determined that the contract, though effective on August 12, 1995, was clearly not executed until late October 1995, and that the union-security provision unlawfully required nonmember incumbent employees to become members of the Union within 30 days of the effective date of the contract, i.e., by September 11, 1995, well over a month before the contract came into existence. Accordingly, he found that the union-security provision was unlawful on its face and that the contract therefore forfeited its bar quality. We disagree. Contrary to the Regional Director, we find that *Federal-Mogul* is controlling here.

In *Federal-Mogul*, supra, 176 NLRB at 619, the preamble to the contract contained the language, "This Agreement made and entered into this 20th day of May, 1968." Prior to the signatures of the parties, the following language appeared, "IN WITNESS WHEREOF, the parties have hereunto set their hands this 10th day of June, 1968." Thus, the Regional Director there concluded, as the Regional Director did in the instant matter, that the difference between the effective date of the contract and the date on which it was signed made the contract retroactively effective and rendered it incapable of a lawful interpretation under *Standard Molding*.

In reversing the Regional Director, the Board in *Federal-Mogul*, supra, reasoned that since the language in the contract's preamble clearly indicated by its very terms that it was "made and entered into" on the effective date, the contract and its union-security provision were actually in effect on that date and had not been put into effect retroactively at the time of the contract's subsequent signing. Id. Accordingly, the Board found that such a contract was not unlawful on its face and that *Standard Molding* was inapplicable. Id. Like in *Federal-Mogul*, we so find here.

In the instant case, the applicable union-security contract provision states that all incumbent employees "shall on the thirtieth (30th) day following the effective date of this Agreement, become and remain members in good standing in the Union." The contract also expressly states that "THIS AGREEMENT made and entered into this 12th day of August" is binding on the parties "for the period August 12, 1995 to August 11, 1998" and that "this Agreement shall be in full force and effect from August 12, 1995 to August 11, 1998." It is thus clear from the terms of the contract itself that it was made and entered into on August 12, 1995, and that it was in fact effective as of that date. Therefore, contrary to the Regional Director, we conclude that the contract was not made effective retroactively. As the allegedly unlawful aspect of the union-security provision at issue here, i.e., the denial of the statutorily required 30-day grace period to nonmember incumbent employees, does not appear on the face of the contract, we further conclude that the contract retains its bar status. See *Paragon Products*, supra, 134 NLRB at 666.

3. Although never litigated during the representation hearing, the Regional Director concluded that the contract forfeited its bar status on three additional grounds: article V of the contract granted super-seniority to the

[7] Although the union-security provision requires membership in the Union without defining one's membership obligations, it is not unlawful on its face. See *Marquez v. Screen Actors Guild,* 525 U.S. 33 (1998).

[8] Since we have concluded that the contract does not require the payment of assessments as a condition of employment, we need not address the effects that either the union-security provision's savings clause or the limiting language of the dues-checkoff clause would have had upon a facially invalid contract provision.

[9] In *Standard Molding*, the Board found that the union-security provision involved showed on its face that it was retroactively effective. Since the contract's grace period was geared to that effective date, it failed to accord nonmember incumbent employees the requisite 30-day grace period required under Sec. 8(a)(3) of the Act. Therefore, because the provision was incapable of lawful interpretation, the Board found the contract forfeited its bar quality. Id. at 1516.

shop steward for all purposes;[10] article V could be construed as conferring certain benefits to employees based solely upon their membership and position in the Union; and article III could be construed as going beyond the limited form of union security permitted by Section 8(a)(3) of the Act given that the 45-day grace period for new employees to meet their membership obligations was identical to the probationary period for new employees. In response, the Employer and the Intervenor now contend that the Regional Director violated their due process rights by not affording them a meaningful opportunity to address the legality of these provisions.

In crafting its contract-bar rules, the Board has taken care to balance the objective of maintaining stability in labor relations against the objective of preserving employee freedom of choice in the selection of a bargaining representative. *Food Haulers, Inc.*, 136 NLRB 394, 395 (1962); *Paragon Products*, supra, 134 NLRB at 663. Thus, in every case in which the Board has found that a contract forfeited its bar status because of the presence of a facially illegal provision, the illegality has been of a character to constrain employee freedom of choice in the selection of a bargaining representative, and the illegality has been clear on the face of the contract, without the necessity of resorting to extrinsic evidence.[11]

The Regional Director's reliance on article V, the super-seniority provision for shop stewards, to deprive the instant contract of bar status fails to comport with the basic principles underlying the Board's contract-bar doctrine. Super-seniority for someone serving in a shop steward position may, in some circumstances, unlawfully encourage union membership. Indeed, that is the theory of *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), and its progeny. But it does not constrain employee freedom of choice in the selection of a representative in the same way that unlawfully required membership does. Thus, under *Food Haulers*, both of the Regional Director's theories for finding this provision a ground for depriving the contract of bar status must fail.[12] Moreover, even apart from the rationale of *Food Haulers*, the Regional Director's reliance on article V is erroneous because whether the provision is lawful or not depends on extrinsic evidence, i.e., whether the conjunction of plant positions and seniority and bumping rules make application of the provision needed in order to assure continuity of representation. See *Goodyear Tire & Rubber Co.*, 322 NLRB 1007 (1997), and cases cited therein. Whenever it is necessary to look to extrinsic evidence in order to determine whether a provision is unlawful, it is improper, under the rules of *Paragon Products*, to rely on that provision to deprive a contract of bar status.[13]

The Regional Director also relies on the coexistence of the 45-day grace period for new employees to meet their membership obligations and the 45-day probationary period for new employees as a further reason why the union-security provision should deprive the contract of its bar status. We note that in reaching this conclusion, the Regional Director does not even purport to claim that the relevant union-security clauses are unlawful on their face, but rather resorts to speculation that the "practical effect" of the concurrent 45-day periods somehow goes beyond the limited form of union security permitted by Section 8(a)(3) of the Act. Once again, the Regional Director runs afoul of the *Paragon Products* rules.

Finally, we must note that it was improper for the Regional Director to decide this case on the three grounds related to articles III and V because neither the Petitioner, nor the hearing officer for that matter, ever raised these as potential contract-bar issues and, consequently, the parties had no notice of them at the time they were

[10] Art. V provides, in pertinent part, "Stewards shall be granted super-seniority for all purposes including lay-off, rehire, bidding and job preference. The Union reserves the right to remove the Shop Steward at any time, for the good of the Union."

[11] In *Pioneer Bus Co.*, 140 NLRB 54 (1962), the Board confronted separate contracts for employees divided along racial lines. This was a facially apparent constraint on employee free choice. In *Pine Transportation, Inc.*, 197 NLRB 256 (1972), the contract granted seniority to employees promoted to positions outside the bargaining unit on the condition that they remained members of the Union, thereby maintaining a union membership requirement that exceeded what is permitted under the 8(a)(3) provision (i.e., membership required to obtain employment seniority). Again, this was apparent on the face of the provision and it implicated employee free choice. By contrast, although the "hot cargo" clause contained in the contract at issue in *Food Haulers*, supra, 136 NLRB at 396 (fn. omitted) was unlawful on its face under Sec. 8(e) of the Act, the contract was deemed a bar because, as the Board observed, such a clause "does not in any sense act as a restraint upon an employee's choice of a bargaining representative."

[12] Significantly, notwithstanding the frequency of the presence of union steward superseniority provisions in contracts, the Board has never held that the presence of such a clause deprived a contract of bar status.

[13] Thus, in *St. Louis Cordage Mills*, 168 NLRB 981 (1967), where the contract limited females to seniority in "jobs traditionally held by females" and similarly limited males to seniority in traditionally male jobs, the Board found that the seniority clause was not unlawful on its face because extrinsic evidence might show that sex was a "bona fide occupational qualification" for the job within the meaning of Title VII of the Civil Rights Act.

The Regional Director took the position that *Teamsters Local 293* (*Lipton Distributing)*, 311 NLRB 538 (1993), shows that the Board will hold a steward superseniority provision unlawful on its face, without even waiting for evidence from the opposing party. The provision in that case, however, had nothing to do with seniority or with assisting a steward in maintaining his or her position in the plant so as to provide for continuity of representation. It simply provided that stewards would be paid more than other employees. The provision on which the Regional Director relied in this case bears no resemblance to that. In any event, *Lipton Distributing* was not a contract-bar case.

presenting their positions at the hearing. As the Employer and the Intervenor correctly note, this was a denial of due process to them. However, because for the reasons stated above, we would not find that the provisions in question deprive the contract of its bar quality, we will not remand to allow the parties an opportunity to contest the matter further.

Accordingly, since we find that the contract serves as a bar to the instant representation petition, and we further find that the petition was untimely filed, we shall reverse the Regional Director and dismiss the petition.